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No. 01-1420

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, AND OTHER PERSONS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

42 U.S.C. §§ 405(j) and 1383(a) authorize the Commissioner of Social Security to appoint a representative payee to receive benefits on behalf of a beneficiary, and social security regulations provide that the payee may use the benefits to pay for the beneficiary's current care. 42 U.S.C. § 407(a) provides that these benefits are not subject to "execution, levy, attachment, garnishment, or other legal process". This case presents the following question:

Does a representative payee violate 42 U.S.C. § 407(a) when the payee uses the benefits to pay for the beneficiary's current care?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Statutory And Regulatory Background 2

1. Social Security Benefits 2

2. Representative Payees 3

3. Use Of Benefits By The Representative Payee 6

4. Section 407(a) 7

B. The Department's Responsibilities As Representative Payee For Foster Children 8

C. Procedural History 15

SUMMARY OF ARGUMENT 19

ARGUMENT 21

A. Social Security Statutes And Regulations Expressly Authorize The Department, Acting As Representative Payee, To Use Benefits For The Beneficiary's Current Maintenance 21

B. Section 407 Does Not Bar A Representative Payee From Using Benefits To Pay For Current Maintenance 23

C. The Decision Below Should Be Reversed Because It Is Inconsistent With The Commissioner's Interpretation Of SSA Regulations, Which Are Entitled To Considerable Weight 31

D. The Department, Acting As Representative Payee, Does Not Act As A Creditor When It Uses Benefits To Pay For a Foster Child's Care 34

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Bennett v. Arkansas
485 U.S. 395 (1988) 24, 28

Bowles v. Seminole Rock & Sand Co.
325 U.S. 410 (1945) 31

Califano v. Jobst
434 U.S. 47 (1977) 22

Crawford v. Gould
56 F.3d 1162 (9th Cir. 1995) 23

Ecolono v. Div. of Reimbursements of the Dep't of Health & Mental Hygiene
769 A.2d 296 (Md. App. 2001) 26

In re the Guardianship of Nelson
547 N.W.2d 105 (Minn. Ct. App. 1996) 30

Mason v. Sybinski
280 F.3d 788 (7th Cir. 2002) 25

Mellies v. Mellies
815 P.2d 114 (Kan. 1991) 30

Philpott v. Essex County Welfare Bd.
409 U.S. 413 (1973) 19, 24, 28

United States v. Larionoff
431 U.S. 864 (1977) 31

Statutes

42 U.S.C. § 1381a 3

42 U.S.C. § 1383(a)(2)(A)(ii)(I) 3, 26

42 U.S.C. § 1383(a)(2)(A)(iii) 3, 27

42 U.S.C. § 1383(a)(2)(B)(i)(I) 3

42 U.S.C. § 1383(a)(2)(B)(i)(II) 4, 6

42 U.S.C. § 1383(a)(2)(B)(iii)(I)-(II) 4

42 U.S.C. § 1383(a)(2)(B)(iii)(III) 4

42 U.S.C. § 1383(a)(2)(B)(v)(I)-(III) 4

42 U.S.C. § 1383(a)(2)(B)(v)(IV) 4

42 U.S.C. § 1383(a)(2)(B)(xi) 5

42 U.S.C. § 1383(a)(2)(C)(i) 5

42 U.S.C. § 1383(a)(2)(C)(i)-(ii) 27

42 U.S.C. § 1383(a)(2)(C)(ii) 5

42 U.S.C. § 1383(a)(2)(C)(iv) 6

42 U.S.C. § 1383(a)(2)(D)(i)(I)-(II) 15

42 U.S.C. § 1383(a)(2)(F) 10

42 U.S.C. § 1383(a)(2)(ii)(I) 21

42 U.S.C. § 1383(a)(2)(v)(I) 29

42 U.S.C. § 1383(a)(4), ... 3

42 U.S.C. § 1383(d)(1) 8

42 U.S.C. § 402(d) 3
42 U.S.C. § 405(a) 6
42 U.S.C. § 405(j)(1)(A) 1, 3, 21, 27
42 U.S.C. § 405(j)(2)(A)(i) 3
42 U.S.C. § 405(j)(2)(A)(ii) 4, 6
42 U.S.C. § 405(j)(2)(C)(i)(I)-(II) 4
42 U.S.C. § 405(j)(2)(C)(i)(III) 4
42 U.S.C. § 405(j)(2)(C)(iii)(I) 29
42 U.S.C. § 405(j)(2)(C)(iii)(I)-(III) 4
42 U.S.C. § 405(j)(2)(C)(iii)(IV) 4
42 U.S.C. § 405(j)(2)(E)(i) 5
42 U.S.C. § 405(j)(3)(A) 5
42 U.S.C. § 405(j)(3)(A)-(B) 27
42 U.S.C. § 405(j)(3)(B) 5
42 U.S.C. § 405(j)(3)(D) 6
42 U.S.C. § 405(j)(4)(A)(i)(I)-(II) 15
42 U.S.C. § 407(a) ..... passim
42 U.S.C. § 408(a)(5) 3
Title XVI of the Social Security Act
(42 U.S.C. §§ 1381 *et seq.*)
(Oct. 30, 1972, Pub. L. No. 92-603, Title I, §§ 132(a)-(c), 136, Title III, § 305(a), 86 Stat. 1360, 1364, 1484) 2

Wash. Rev. Code § 13.34 8
Wash. Rev. Code § 13.34.030(5) 8
Wash. Rev. Code § 13.34.130(1)(b) 8
Wash. Rev. Code § 13.34.130(2) 8
Wash. Rev. Code §§ 26.20.030-.035 29
Wash. Rev. Code § 74.13.060(2) 12, 38
Wash. Rev. Code § 74.13.060(5) 17
Wash. Rev. Code § 74.20A.010 11

Other Authorities

26 Fed. Reg. 11828 32
47 Fed. Reg. 20468-01 28

Regulations

20 C.F.R. § 404.1604 32
20 C.F.R. § 404.2021(b) 5
20 C.F.R. § 404.2021(b)(1) 29
20 C.F.R. § 404.2035 ..... 6, 27
20 C.F.R. § 404.2035(a) 21
20 C.F.R. § 404.2040 24
20 C.F.R. § 404.2040(a)(1) 7, 21, 22

20 C.F.R. § 404.2040(d) 7

20 C.F.R. § 404.2045 7

20 C.F.R. § 416.621(b) 5

20 C.F.R. § 416.621(b)(1) 29

20 C.F.R. § 416.635(a) 6, 21, 27

20 C.F.R. § 416.640(a) 6, 22

20 C.F.R. § 416.640(d) 7

20 C.F.R. § 416.645 7

20 C.F.R. § 426.640 24

Wash. Admin. Code § 388-25-0210 12

Wash. Admin. Code § 388-70-069 12

Wash. Admin. Code § 388-70-069(1) 12

Social Security Administration Rulings

SSR 66-20, 1960-1974 Soc. Sec. Rep. Ser. 385 (1966 WL 3055 (S.S.A.)) 33, 35

SSR 68-18, 1960-1974 Soc. Sec. Rep. Ser. 516 (1968 WL 3918 (S.S.A.)) 33, 35

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 145 Wash. 2d 1, 32 P.3d 267. Pet. App. 1. The Okanogan County Superior Court's Memorandum Opinion (Pet. App. 122), Plaintiff's Order Granting Plaintiff's Motion For Summary Judgment (Pet. App. 112), and Court's Findings Of Fact On Order Of Remand From The Supreme Court (Pet. App. 46), are unpublished.

JURISDICTION

The judgment of the Washington Supreme Court was entered October 11, 2001. Pet. App. 1. A timely motion for reconsideration was denied on December 14, 2001. Pet. App. 40. The petition for a writ of certiorari was filed March 14, 2002, and was granted May 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 405(j)(1)(A), provides, in part: "If the Commissioner of Social Security determines that the interest of any individual under this subchapter, would be served thereby, certification of payment of such individual's benefit under this subchapter may be made . . . for his or her use and benefit, to another individual, or an organization, with respect to whom the requirements of paragraph (2) have been met (hereinafter in this subsection referred to as the individual's "representative payee")." Pet. App. 157.

42 U.S.C. § 1383(a)(2)(ii)(I), provides in part: "Upon a determination by the Commissioner of Social Security that the interest of such individual

would be served thereby, such payments shall be made . . . to another individual, or an organization, with respect to whom the requirements of subparagraph (B) have been met (in this paragraph referred to as such individual's 'representative payee') for the use and benefit of the individual[.]"

42 U.S.C. § 407(a), provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." Pet. App. 170.

The other relevant provisions of Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq.* (Pet. App. 145); Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.* (Pet. App. 177); social security regulations (Pet. App. 205); and Washington state statutes and regulations (Pet. App. 245 and 256, respectively), are set forth in the appendix to the certiorari petition.

STATEMENT

A. Statutory And Regulatory Background

1. Social Security Benefits

This case involves two different categories of benefits under the Social Security Act. The first is Old Age, Survivors and Disability Insurance Program (OASDI) authorized by Title II of the Act. 42 U.S.C. §§ 401 *et seq.* Under Title II, a child is eligible for OASDI benefits if the child is under the age of 18, unmarried, and was dependent on a wage

earner entitled to Title II benefits. 42 U.S.C. § 402(d), Pet. App. 145. The second type of social security benefit is Supplemental Security Income (SSI) authorized by Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.* SSI benefits are available to aged, blind, or disabled individuals, including children, who meet certain income and resource requirements. 42 U.S.C. § 1381a, Pet. App. 177.

2. Representative Payees

When an individual qualifies for OASDI or SSI benefits, the Commissioner of Social Security (Commissioner) is authorized to appoint a representative payee to receive the benefits on behalf of the qualified individual if the Commissioner "determines that the interest of [the] individual under this subchapter, would be served thereby". 42 U.S.C. §§ 405(j)(1)(A), Pet. App. 157; 1383(a)(2)(A)(ii)(I), Pet. App. 178. The benefits paid to the representative payee are for the beneficiary's use and benefit only. Misuse of the benefits is grounds for decertification as representative payee (*see* 42 U.S.C. § 405(j)(1)(A), Pet. App. 157; 1383(a)(2)(A)(iii), Pet. App. 179) and also a criminal offense (*see* 42 U.S.C. §§ 408(a)(5), Pet. App. 172; 1383(a)(4), Pet. App. 192).

Congress set out comprehensive requirements for the certification of payments to a representative payee. First, the Commissioner is required to conduct an investigation of the person seeking to be appointed representative payee. To the extent practicable this shall include a face-to-face interview. 42 U.S.C. §§ 405(j)(2)(A)(i), Pet. App. 158; 1383(a)(2)(B)(i)(I), Pet. App. 179. The commissioner

may approve certification of benefits to a potential representative payee only if there is "adequate evidence that such certification is in the interest of [the beneficiary] (as determined by the Commissioner . . . in regulations)". 42 U.S.C. §§ 405(j)(2)(A)(ii), Pet. App. 158; 1383(a)(2)(B)(i)(II), Pet. App. 179.

Congress also imposes limits on who the Commissioner may appoint as representative payee. The Commissioner cannot appoint any person who has been convicted of misusing benefits, and individuals who have previously had their designation as representative payee revoked are generally disqualified as well. 42 U.S.C. §§ 405(j)(2)(C)(i)(I)-(II), Pet. App. 160; 1383(a)(2)(B)(iii)(I)-(II), Pet. App. 180-81. As a general rule, Congress also prohibits appointment of any person who "is a creditor of [the beneficiary] who provides [the beneficiary] with goods or services for consideration". 42 U.S.C. §§ 405(j)(2)(C)(i)(III), Pet. App. 160; 1383(a)(2)(B)(iii)(III), Pet. App. 181.[1]

The Commissioner's regulations establish an order of preference for appointment as

[1] This prohibition does not apply if the creditor is a relative living in the same household as the beneficiary; is the legal guardian or legal representative of the beneficiary; or is a facility licensed as a care facility under the laws of a state or political subdivision. 42 U.S.C. §§ 405(j)(2)(C)(iii)(I)-(III), Pet. App. 160-61; 1383(a)(2)(B)(v)(I)-(III), Pet. App. 181. Congress also permits the Commissioner to certify the payment of benefits to the administrator, owner, or employee of a licensed care facility if the beneficiary resides in the care facility and the Commissioner has been unable to find an alternate payee. 42 U.S.C. §§ 405(j)(2)(C)(iii)(IV), Pet. App. 161; 1383(a)(2)(B)(v)(IV), Pet. App. 181-82.

representative payee. For a beneficiary under the age of 18, the first preference is a natural or adoptive parent who has custody of the child or a guardian. This is followed by parents without custody, relatives, and close friends. The last preference is an authorized social service agency or custodial institution. 20 C.F.R. §§ 404.2021(b), Pet. App. 209-10; 416.621(b), 234-35.

Once the Commissioner selects a representative payee, Congress provides a mechanism for any challenge to that choice. "Any individual who is dissatisfied . . . with the designation of a particular person to serve as representative payee shall be entitled to a hearing by the Commissioner". 42 U.S.C. §§ 405(j)(2)(E)(i), Pet. App. 163; 1383(a)(2)(B)(xi), Pet. App. 184.

Finally, Congress requires the Commissioner to "establish a system of accountability monitoring whereby [representative payees] shall report not less often than annually with respect to the use of such payments". 42 U.S.C. §§ 405(j)(3)(A), Pet. App. 165; 1383(a)(2)(C)(i), Pet. App. 185. As part of this monitoring, the Commissioner "shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which [representative payees] are not properly using such payments". 42 U.S.C. §§ 405(j)((3)(A), Pet. App. 165; 1383(a)(2)(C)(i), Pet. App. 185. If the representative payee is a state institution, the Commissioner "shall establish a system of accountability monitoring for institutions in each State". 42 U.S.C. §§ 405(j)(3)(B), Pet. App. 165; 1383(a)(2)(C)(ii), Pet. App. 185-86. In addition to this monitoring, the Commissioner can require a report from a payee at any time if the Commissioner

believes that benefits are being misused. 42 U.S.C. §§ 405(j)(3)(D), Pet. App. 165; 1383(a)(2)(C)(iv), Pet. App. 186.

3. Use Of Benefits By The Representative Payee

In contrast to the detailed requirements governing the designation of a representative payee, Congress did not specify precisely how benefits should be used, beyond the general rule that certification must be "in the interest of the [beneficiary] *(as determined by the Commissioner . . . in regulations)*". 42 U.S.C. § 405(j)(2)(A)(ii) (emphasis added), Pet. App. 158; 42 U.S.C. § 1383(a)(2)(B)(i)(II), Pet. App. 179. Congress delegated to the Commissioner the task of determining what uses of benefits are "in the interest" of the beneficiary, and thus consistent with the statute.

Under authority codified in 42 U.S.C. § 405(a), Pet. App. 156, the Commissioner has adopted regulations specifying the proper use of benefits by a representative payee. Once appointed, the representative payee is responsible for using the benefits "only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary". 20 C.F.R. §§ 404.2035, Pet. App. 213; 416.635(a), Pet. App. 236. Most important for this case, the benefits are deemed conclusively to have been used "for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance". 20 C.F.R. §§ 404.2040(a)(1), Pet. App. 214; 416.640(a), PA. at 237. Current maintenance

includes "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items". 20 C.F.R. §§ 404.2040(a)(1), Pet. App. 214; 416.640(a), Pet. App. 237.

The Commissioner's regulations also address claims of creditors. "A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee." 20 C.F.R. §§ 404.2040(d), Pet. App. 216; 416.640(d), Pet. App. 239. If a debt arose prior to the first month for which payments were certified "a payee may satisfy it . . . if the current and reasonably foreseeable needs of the beneficiary are met". 20 C.F.R. §§ 404.2040(d), Pet. App. 216; 416.640(d), Pet. App. 239.

After a representative payee has used the benefits for current maintenance and the other purposes authorized under the regulations, any remaining amount must be conserved or invested, preferably in interest-bearing accounts. 20 C.F.R. §§ 404.2045, Pet. App. 223; 416.645, Pet. App. 242.

4. Section 407(a)

The Social Security Act also contains an anti-attachment provision that limits the ability of third-parties to attach or legally encumber OASDI and SSI benefits. According to that provision:

> "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment,

garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a), Pet. App. 170.

See also 42 U.S.C. § 1383(d)(1), Pet. App. 200 (applying § 407(a) to SSI benefits).

B. The Department's Responsibilities As Representative Payee For Foster Children

1. The Department of Social and Health Services (Department or DSHS) is responsible for protecting abused and neglected children in Washington. Washington has a carefully crafted system, including judicial oversight, for removing a dependent child from his or her home and placing the child in foster care. Wash. Rev. Code 13.34. A "dependent child" is one who has been abandoned, is abused or neglected, or has no parent, guardian, or other custodian capable of adequately caring for the child. Wash. Rev. Code § 13.34.030(5), Pet. App. 246. Once a court finds that a child is dependent it may order "the child to be removed from his or her home and into the *custody, control, and care of a relative or the department* or a licensed child placing agency for placement in a foster family home or group care facility". Wash. Rev. Code § 13.34.130(1)(b), Pet. App. 250 (emphasis added). When a child is removed from the home, "[p]lacement of the child with a relative . . . shall be given preference by the court." Wash. Rev. Code § 13.34.130(2), Pet. App. 251. Thus, children in the Department's custody are placed in foster care when there is no suitable relative willing or able to care for them. In September 1999, there were 10,578 foster children in the Department's care. Pet. App. 49, ¶ 3.

2. Foster care includes receiving care for emergency 24-hour placement, family foster care, group care, and residential treatment services, which includes group care and therapeutic foster care. JA 190, ¶ 2. Through those programs, the Department provides a wide range of foster care services.[2] These include paying for room, board, clothing, and personal incidentals in family foster care (3210, JA 420-23); paying for additional clothing in excess of the monthly clothing allowance (3225, JA 447-50); paying for additional maintenance for children with behavioral or emotional problems or who are intellectually or physically handicapped (3212, JA 428-30); and paying exceptional costs for enhanced services such as recreational activities that are part of the case plan and typically related to skill building or the development of an enhanced self-image (3217, JA 438-41). The Department pays for evaluations and treatment by a psychologist or psychiatrist in line with the goals of the case plan. (3232/3235, JA 451-53, 460-62). The Department also pays for services to children with complex medical conditions that require skilled nursing care (3448, JA 467-69), and for services for children with extreme behavioral and emotional disorders (3455, JA 469-71).

3. When children enter foster care, the Department checks to see whether they are eligible

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[2] As part of its payment system, the Department has over 100 service codes for the various services it provides. State's Exhibit No. 1: Defendant's Response To Plaintiff's Order To Produce No. 9, Social Service Payment System Manual, App. C. For example, service code 3210 is for room, board, clothing, and personal incidentals for children in family foster care. JA 420-23.

for OASDI benefits and evaluates children to determine whether they have significant physical or mental impairments that would qualify them for SSI benefits. The Department applies for benefits if it concludes that a child may be eligible, and the Department will appeal a denial of benefits if it concludes that the denial is in error. JA 193, ¶ 8; Pet. App. 63, ¶ 59.

When the Social Security Administration (SSA or Administration) approves benefits for one of these children, it usually appoints the Department representative payee. Because state agencies are listed last in the order of preference for representative payee (*see supra* at 4-5), this generally means that there is nobody else able to serve as payee. As of September 1999, there were about 1,480 children in foster care receiving benefits – 469 received OASDI benefits, 923 received SSI benefits, and 88 received both, and the Department was representative payee for 1,411 of them. Pet. App. 49, ¶ 6-7.

4. When the Department receives OASDI and SSI benefits, it deposits them in a special Foster Care Trust Fund Account in the State Treasurer's Office.[3] The Department maintains an individual

[3] An exception occurs when the Department receives a retroactive lump sum payment of SSI benefits that exceeds six times the monthly benefit amount. In this case, SSA deposits the lump sum payment directly into a dedicated interest-bearing account in a local bank. These funds cannot be used to pay for foster care services and can only be expended for special needs, primarily related to the impairment that gave rise to SSI eligibility. 42 U.S.C. § 1383(a)(2)(F), Pet. App. 188-91; JA 137-38, ¶ 6; Pet. App. 52, ¶ 18.

subsidiary account for each child.[4] JA 137, ¶¶ 4-5; Pet. App. 51-52, ¶¶ 16-17. The Department works to ensure that each child receives the correct benefits and works with SSA to resolve discrepancies regarding benefits due or over-payments. The Department monitors each child and files the necessary forms to maintain a child's eligibility for OASDI and SSI benefits. JA 196, ¶¶ 14-16; PA at 64-66, ¶¶ 63-67. The Department also complies with SSA's strict reporting and accounting requirements. JA 141-42, ¶¶ 13-16; Pet. App. 67, ¶¶ 71-73.

5. Although the Department pays the cost of foster care, that is not primarily an obligation of the state. Foster care is a form of public assistance, and the Washington Legislature has declared that it is the "public policy [of Washington] that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs". Wash. Rev. Code § 74.20A.010, Pet. App. 255. As required by federal law, the Department actively enforces parental child support obligations for children in foster care and these funds are used to pay for the cost of care. JA 129-133.

In addition to requiring parents to pay for the care of their children, the Department is authorized to use OASDI and SSI benefits to pay for a child's current care. If no guardian for a child's estate has been appointed, the Secretary of the Department

[4] The Joint Appendix contains samples of the individual accounts of five foster children showing when the Department received benefit payments and when it used those payments to pay for the cost of care. JA 215-19, 228-69, 314-17, 323-33.

(Secretary) is authorized by state statute to act as representative payee for children in foster care, and he "may apply such funds against the amount of public assistance otherwise payable to such [foster child]". Wash. Rev. Code § 74.13.060(2), (5), Pet. App. 253, 254. Under a regulation adopted by the Secretary, if "a child in foster care is entitled to financial benefits the income received shall be used on behalf of the child to help pay for the cost of foster care received". Wash. Admin. Code § 388-70-069(1), Pet. App. 257.[5]

6. The Department does not usually purchase food, clothing, shelter, and other services directly. Rather, they are purchased by the foster care provider, who is then paid by the Department. JA 193, ¶ 7; Pet. App. 55, ¶ 25. Every month the Department generates a report of how much it has paid to the foster care provider for each child. The Department compares this amount to the amount in the child's individual benefit account. If the amount in the trust fund account is equal to or less than the entire cost of foster care, then trust fund proceeds are used to reimburse the Department – unless the Department elects to forgo reimbursement so funds can be used to meet a child's special needs beyond what foster care normally provides. JA 138-39, ¶¶ 8-9; Pet. App. 56-57, ¶¶ 27-32.

Social security benefits seldom cover all of the actual cost of foster care. A sample of representative

[5] Wash. Admin. Code § 388-70-069 was repealed in April 2001, but was replaced with a functionally similar provision, Wash. Admin. Code § 388-25-0210. Pet. App. 257, 256.

accounts illustrate this point.[6] Between 1997-1999, for example, the Department paid $30,097 for the care of Nacole B. and applied only $7,912 in social security benefits to pay for her care.[7] During this period, the cost of foster care for Jasmine C. was $15,681, and the amount of social security reimbursed was $7,189.[8] For Denita S., the cost of care was $19,240, and the amount of social security benefits applied to pay for care was $3,529.[9]

Typically, there is a two month delay between the time the Department receives a benefit and the time it uses the benefit to pay for care. However, despite this lag, the benefit is used to pay for care provided in the month for which the benefit was granted. That is, a benefit recovered for January generally would be used by the Department two months later, in March, to cover the cost of care provided in January.[10] Sometimes there is a delay in

[6] The Joint Appendix contains records for four foster children, with the total amount of foster care paid by the Department between 1997 and 1999. JA 392-402.

[7] *Compare* JA 216-19 (foster care reimbursed 8/5/97 through 12/01/98) *and* JA 395.

[8] *Compare* JA 232-34 (foster care reimbursed 3/17/97 through 5/15/98) *and* JA 398.

[9] *Compare* JA 315-17 (foster care reimbursed 11/14/97 through 4/2/99) *and* JA 402.

[10] For example, on 10/8/97 Denita S. received an SSI benefit in the amount of $599 for the month of September 1997. On 11/05/97 she received another payment of $599 for October 1997. On 11/14/97 the Department used $599 to pay for the care she received in September 1997. JA 315. This payment did not cover the actual cost of her care for the month of September, which was $3,000. JA 400-01 (payments for 9/4/97 to 9/30/97).

granting benefits – for example, if benefits are initially denied and the Department successfully appeals. In that case, SSA grants retroactive benefits, and the Department uses those benefits to pay for care, but only for the months for which the benefits were granted.[11]

7. The Department's social workers also monitor foster children to determine if they have any special needs such as computers, toys, athletic equipment, and orthodontics. The social worker can request that the child's social security benefits be used to pay for these special needs. JA 139, § 9; 195, § 11; Pet. App. 57-58, ¶¶ 34-37. In some cases, the Department will use benefits to pay for special needs instead of using the benefits to pay for the cost of foster care. The Department may also forgo paying for foster care to conserve benefits for a time prior to a child's emancipation so that the child will have funds for the transition to independent living. Pet. App. 57, §§ 31-32; JA 140, ¶ 10; 150-51, 165, 168, 171-72, 178, 319-22. Any funds that are not used to pay for foster care or special needs are deposited in an interest bearing account, and the interest earned is credited to the child's trust fund

[11] For example, Nacole B. entered foster care in February 1997. JA 392. On 7/23/97 she received 5 SSI payments of $491.55 for a total of $2457.75. The benefits were for the months of March through July 1997. On 8/5/97 the Department used $1966.20 to pay for care. Even though she had been in foster care for 6 months – since February – the Department only used the funds to pay for care provided in the four months of March through June. JA 216. The payment of $1966.20 did not cover the actual cost of care for March through June, which was $8,119. JA 392-93 (payments for 3/1/97 through 6/30/97).

account. JA 140, ¶ 11.[12] These funds may be used for increased foster care services or special needs.

8. All of the social security benefits received by the Department are used to pay for the beneficiary's care or special needs or put into savings for the beneficiary. Pet. App. 56-58, ¶¶ 27-37. None of the funds are used to pay the Department's administrative expenses. This is so despite the fact that the Social Security Act permits a representative payee to use benefits to offset administrative expenses. The amount is limited to the "lesser of 10 percent of the monthly benefit involved, or $25.00 per month". 42 U.S.C. §§ 405(j)(4)(A)(i)(I)-(II), Pet. App. 166-67; 1383(a)(2)(D)(i)(I)-(II), Pet. App. 186-87. State law provides that the Secretary shall serve as payee "without compensation of such moneys and other funds of any person which may come into the possession of the secretary during the period such person is placed with the department". Wash. Rev. Code § 74.13.060, Pet. App. 253.

C. Procedural History

1. Danny Keffeler was initially placed in foster care by his mother under a voluntary placement agreement. JA 96. After Danny's mother was killed in an accident, the Okanogan County Superior Court appointed Danny's grandmother, respondent Wanda Pierce, guardian of his estate. Although Mrs. Pierce was appointed his guardian,

[12] For example, the account of Jennifer F. reflects deposits to savings on 8/30/89 ($300) (JA 239) and 11/27/89 ($115.40) (JA 240). The account also shows the interest received. JA 270-72.

the court found that Danny was dependent and left him in foster care in the custody of the Department.

Danny became eligible for OASDI benefits when his mother died, and Mrs. Pierce was appointed representative payee to receive the benefits. JA 99. Subsequently, the Commissioner removed Mrs. Pierce and appointed the Department payee. The Department served in this capacity for about two years and used his OASDI benefits to help pay for the cost of Danny's care. Mrs. Pierce objected to her removal as Danny's payee, and she was ultimately reinstated. JA 77-85

2. In 1996, Mrs. Pierce brought an action against the Department on behalf of the Estate of Danny Keffeler to recover the social security benefits the Department used to pay for Danny's care during the time when the Department was his representative payee. The action was also brought on behalf of a class of foster children in the Department's care who receive social security benefits. The complaint alleged that the Department's use of social security benefits to pay for the cost of care violated the Social Security Act's anti-attachment provision, 42 U.S.C. § 407(a) (JA 9-22).

In 1998, the trial court granted summary judgment to the plaintiffs, concluding that the Department's use of OASDI and SSI benefits to pay for current care violated 42 U.S.C. § 407(a). The court enjoined the Department from using OASDI and SSI benefits to pay for the cost of a child's foster care and "from in any way administering the funds to offset the State's cost of maintaining a child in foster care". Pet. App. 117, ¶ 2.3. The court also

ordered the establishment of a fund to pay individual claims by class members. Pet. App. 118, ¶¶ 4.1-4.2.[13]

3. The Department appealed to the Washington Court of Appeals, which certified the case to the Washington Supreme Court.[14] On October 11, 2001, the Washington Supreme Court issued a divided decision affirming the trial court.

The five-justice majority began by observing that § 407(a) "specifically protects social security benefits from transfer, assignment, execution, levy, attachment, garnishment, and other legal process". Pet. App. 18. But the majority did not undertake an analysis of the phrase "other legal process", nor of any of the other terms used in the statute. Rather, the court determined, "the critical question" in this case is whether the Department "acts as a creditor" when it "reimburses itself for foster care costs out of the foster children's benefits". Pet. App. 19-20.

Whether the Department is a "creditor" for these purposes, the court went on to hold, is not

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[13] The trial court separately awarded Danny Keffeler $4,998, for benefits the Department used to pay for Danny's care while the Department was his payee. Pet. App. 120, ¶ 6.1. The actual cost of Danny's care between June 1991 through March 1995 was $27,833. JA 76. The total amount the Department spent on Danny's care exceeded $43,000. JA 97.

[14] The Department did not appeal the judgment in favor of Danny Keffeler. As a matter of state law, the Department was not authorized to be Danny's payee because his grandmother, Wanda Pierce, had been appointed guardian of his estate. *See* Wash. Rev. Code § 74.13.060(5) (Pet. App. 254) ("appointment of a guardian for the estate of such person shall terminate the secretary's authority as custodian of said funds").

affected by its status as a representative payee. Though it acknowledged some factual dissimilarities (Pet. App. 20), the court relied primarily on decisions by this Court involving efforts by states that are *not* representative payees to use the legal system to obtain the rights to social security benefits.

Based on its analysis of those decisions, the majority held that "reimbursement is barred by § 407(a) because despite [the Department's] status as representative payee it performs the role of creditor when it takes the foster child's [benefits] to reimburse itself for moneys spent on the child". Pet. App. 25.

Three Justices joined an opinion concurring in part and dissenting in part. These Justices dissented from the majority's holding that § 407(a) prohibits the Department from using social security benefits to pay for current care (Pet. App. 32), rejecting the majority's reliance on cases that do not involve "the expenditure of social security benefits by a state that was designated as a representative payee" (Pet. App. 36). These justices concurred in part only insofar as they believed that the Department had used social security benefits to pay for "past due" foster care expenses, a practice they concluded was impermissible. Pet. App. 32.

4. The Washington Supreme Court denied the Department's timely motion for reconsideration on December 14, 2001. On January 22, 2002, the Department requested a stay of the injunction from the Washington Supreme Court. The request for a stay was denied the same day. Pet. App. 143. On January 28, 2002, the Department filed an

Application for a stay with Justice O'Connor as the Circuit Justice for the Ninth Circuit. On January 29, 2002, Justice O'Connor issued a temporary stay. Pet. App. 142. After the Solicitor General filed an amicus brief in support of the stay, the Court granted the stay on March 13, 2002. JA 8. The Department filed a petition for a writ of certiorari March 14, 2002, and the petition was granted May 28, 2002.

SUMMARY OF ARGUMENT

The Washington Supreme Court made a fundamental mistake in analyzing the issue in this case. According to the court, the "crucial question" in this case is whether "DSHS acts as a *creditor* when it reimburses itself for foster care costs out of the foster children's" social security benefits. Pet. App. 19-20 (emphasis in original). This characterization of the crucial question is erroneous. The text of § 407(a) makes no reference to creditors, and as this Court explained in *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973), "§ 407 does not refer to any claim of creditors; it imposes a broad bar against the use of legal process to reach social security benefits". Thus, the question is not whether the Department acts as a creditor. The crucial question is whether following the statutes and regulations governing the appointment of a representative payee and the payee's use of benefits to pay for the beneficiary's current care constitutes an "execution, levy, attachment, garnishment, or other legal process" banned by § 407(a). The answer to this question is no. Social security statutes and regulations authorize the Department, acting as representative payee, to use benefits to pay for a beneficiary's current maintenance. Section 407 does not ban what

these other statutes and regulations authorize. Accordingly, the decision below should be reversed.

In reaching its conclusion, the court below ignored the text of the social security statutes and regulations. Instead, it appeared to base its decision on its conclusion that foster children would be better off with a private representative payee. Even if this were appropriate analysis – which it is not – the court's conclusion is wrong. In every state government agencies perform the function of representative payee for foster children. Brief Of The States Of Florida, et al., As Amici Curiae In Support Of Petitioners, *State of Washington v. Guardianship Estate of Danny Keffeler*, Supreme Court, No. 01-1420, filed April 2002, at 1. This is a vital function. As the amici curiae brief filed by the Children's Defense Fund, Catholic Charities, USA, the Child Welfare League of America and the Alliance for Children and Families explains, if it were not for the effort of these state agencies, the disabilities of many children might go unrecognized, and they would never be determined eligible for – or actually receive benefits. Simply put, many of these children have no relative or friend to apply for benefits or act as representative payee. The state agencies willingness to serve as payee is essential to these children receiving benefits. Brief of Children's Defense Fund, et al., As Amici Curiae In Support Of Petitioners, *State of Washington v. Guardianship Estate of Danny Keffeler*, Supreme Court, No. 01-1420, filed April 2002, at 15.

ARGUMENT

A. Social Security Statutes And Regulations Expressly Authorize The Department, Acting As Representative Payee, To Use Benefits For The Beneficiary's Current Maintenance

1. The regulatory framework that governs this case is straight forward and expressly authorizes the practices at issue here. First, the Commissioner is authorized to appoint a representative payee to receive social security benefits on behalf of a qualified individual when the Commissioner "determines that the interest of [the] individual . . . would be served thereby". 42 U.S.C. §§ 405(j)(1)(A), Pet. App. 157; 1383(a)(2)(ii)(I), Pet. App. 178. Acting under this authority, the Commissioner appointed the Department representative payee for eligible foster children in its care.

Second, it is the responsibility of a representative payee to:

> "Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary[.]" 20 C.F.R. §§ 404.2035(a), Pet. App. 213; 416.635(a), Pet. App. 236.

Third, the Commissioner's regulations, which explain precisely how representative payees may and should use social security benefits, expressly permit use for the current maintenance of the beneficiary. Under 20 C.F.R. § 404.2040(a)(1), payments "used for

the beneficiary's current maintenance" are deemed to be used for "the use and benefit of the beneficiary". Pet. App. 214. *See also* 20 C.F.R. § 416.640(a), PA at 237. The regulation goes on to provide that current maintenance "includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items" (20 C.F.R. §§ 404.2040(a)(1), Pet. App. 214; 416.640(a), Pet. App. 237) – precisely the costs for which the Department uses the social security benefits in question.

In sum, the Department's appointment as representative payee and its use of the benefits to pay for current maintenance are expressly authorized by social security statutes and regulations.

2. Moreover, that use is entirely consistent with the statutory purposes of the OASDI and SSI programs. This Court has stated that OASDI benefits for dependants, such as children, are "intended to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support". *Califano v. Jobst*, 434 U.S. 47, 50 (1977). Similarly, the purpose of SSI benefits is "to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level". The Department's use of the benefits to cover the cost of foster care furthers these purposes; barring the use of benefits would defeat them.

B. Section 407 Does Not Bar A Representative Payee From Using Benefits To Pay For Current Maintenance

1. The decision below holds that § 407(a) bars the Department, acting as representative payee, from using social security benefits to pay for a beneficiary's current maintenance. That holding is wrong. By its terms, § 407(a) has no bearing at all on the use of social security benefits by a representative payee.

Section 407(a) provides that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process". Pet. App. 170. That provision plainly contemplates the use of compulsory legal process to seize benefits without the consent of the payee. Even if, as some lower courts have held, § 407(a) should be read broadly to reach beyond formal judicial process, it is by its terms limited to efforts by third parties to gain access to benefits through some coercive process. *See, e.g., Crawford v. Gould*, 56 F.3d 1162, 1167 (9th Cir. 1995) (extending § 407(a) to a "resort to express or implied threats or sanctions"). It has no sensible application to circumstances like these involving a voluntary decision by a duly designated payee to use benefits in a manner expressly approved by regulation.

It is obvious – and not disputed by the court below – that the Department's use of benefits to pay for current maintenance does not constitute an execution, levy, attachment, or garnishment. These are legal terms of art, describing particular formal legal procedures by which property is seized. The

Department, on the other hand, does not seize social security benefits, by these or any other procedures – it simply received them, as a duly appointed representative payee.

The only real question in this case – unaddressed by the court below – is whether the appointment of the Department is legal process within the meaning of § 407(a). A process must share the characteristics of those specifically identified – execution, levy, attachment, garnishment – which means, at a minimum, that it must involve some effort to obtain benefits through compulsion. There is no such compulsion here. The Department engages in no coercive activity or process in order to use children's social security benefits to pay for some of the costs of their current maintenance. Under 20 C.F.R. §§ 404.2040 and 426.640, it does no more than use funds already in its possession in accordance with express regulatory authorization.

In concluding that § 407(a) does prohibit the practice at issue here, the court below failed to engage in any meaningful analysis of the statutory text. Instead, it ruled almost exclusively on two of this Court's cases considering the application of § 407(a), *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), and *Bennett v. Arkansas*, 485 U.S. 395 (1988). In *Philpott*, the Court applied § 407(a) to bar a state lawsuit to reach social security benefits in an individual bank account under an agreement to reimburse. In *Bennett*, the Court applied the statute to bar a court action by a state seeking to attach social security benefits under a statute that authorized the state to seize a prisoner's property or estate to help defray the cost of maintaining the

prison system. Critically, in neither case was the state a representative payee appointed by the Commissioner to receive social security payments – which meant that in both cases, the state was required to use formal legal compulsion in an effort to gain access to the benefits at issue. Though the court below noted "some factual dissimilarities between *Philpott* and *Bennett*, on the one hand, and this case on the other, it failed to appreciate that application of § 407(a) turns entirely on this distinction.

By contrast, the lower courts have easily concluded that § 407(a) is not implicated when a state appointed representative payee uses social security benefits to defray the costs of state-provided care. In *Mason v. Sybinski*, 280 F.3d 788 (7th Cir. 2002), for example, the Seventh Circuit held that a payee's use of benefits to pay for the current maintenance of beneficiaries in a state hospital did not violate § 407(a) because "no attachment or legal process took place. A properly appointed representative's responsible management of a Social Security recipient's benefits cannot amount to 'other legal process,' regardless of whether that payee is an arm of the state." *Mason*, 280 F.3d at 792-93. In other words, § 407(a) "was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations". *Id.* at 793.

The Eighth Circuit reached the same conclusion in *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), *cert. denied sub nom. Crytes v. Schafer*, 502 U.S. 1095 (1992), holding that "other legal process" does not include appointment of a representative payee who uses benefits to pay for current

maintenance. "We cannot believe Congress contemplated this result in enacting § 407(a), particularly when this result would be contrary to another provision of the Social Security Act: § 405(j), providing for the appointment of representative payees." *King*, 940 F.2d at 1185. *See also C.G.A. v. Alaska*, 824 P.2d 1364 (Alaska 1992) (same); *Ecolono v. Division of Reimbursements of the Department of Health & Mental Hygiene*, 769 A.2d 296, 309 (Md. App. 2001) ("the fact that a State as representative payee uses current benefits for current maintenance without threats, coercion, or misrepresentation does not involve 'legal process').

2. Section 407(a) should properly be read together with 42 U.S.C. §§ 405(j) and 1383(a)(2)(A)(ii)(I) which authorize the Commissioner to appoint representative payees, including state agencies when no other qualified payee is available. Instead of violating § 407(a), the Department's use of social security benefits actually implements a carefully crafted federal statutory plan to appoint responsible representative payees for needy children and ensure that benefits are properly used. It is illogical to conclude that § 407(a) prohibits what §§ 405(j) and 1383(a)(2)(A)(ii)(I) permit, especially when the provisions are easily harmonized. Section 407(a) protects benefits from execution, levy, attachment, garnishment, or other legal process by a person who is not a representative payee. When a representative payee is appointed, it becomes the Commissioner's job to ensure that the payee is using the benefits properly.

The court below seems to have been under the misimpression that this is an empty legal technicality, used only to circumvent statutory

intent. That is incorrect. There is an important practical distinction between a mere creditor and a state acting as a representative payee. Once a state agency becomes a representative payee, it – unlike creditors – is subject to the supervision of the Commissioner. The Commissioner investigates, appoints, and monitors representative payees to ensure that benefits are properly used. The Commissioner's regulations provide that a payee may use benefits for the beneficiary's current care. 20 C.F.R. §§ 404.2035, Pet. App. 213; 416.635(a), Pet. App. 236. The representative payee must report to the Commissioner to account for the use of the benefits. 42 U.S.C. §§ 405(j)(3)(A)-(B), Pet. App. 165; 1383(a)(2)(C)(i)-(ii), Pet. App. 185-86. If the Commissioner finds that a representative payee has misused benefits, the law requires the Commissioner to "promptly revoke certification for payment of benefits to such representative payee . . . and certify payment to an alternative representative payee". 42 U.S.C. §§ 405(j)(1)(A), Pet. App. 157; 1383(a)(2)(A)(iii), Pet. App. 179. Moreover, a representative payee is subject to criminal penalties for misusing the benefits. 42 U.S.C. § 408(a)(5), Pet. App. 172. 42 U.S.C. § 1383a(a)(4). The Commissioner has a strong incentive to fulfill these oversight responsibilities. In cases "where the negligent failure of the Commissioner . . . to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner . . . shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits". 42 U.S.C. § 405(j)(5), JA 168; 42 U.S.C. §1383(a)(2)(E), JA 188.

In other words, the concerns identified in cases like *Philpott* and *Bennett* arise when states attempt to gain control over social security benefits without subjecting themselves to supervision by the Commissioner. Cases like this one are entirely different: once the Department is appointed representative payee and made subject to the Commissioner's oversight, the Commissioner stands in a position to ensure that benefits are used only in accordance with statutory intent.

Section 407(a) makes perfect sense when considered in tandem with the provisions regarding representative payees. Section 407(a) does not prohibit representative payees from using benefits for current maintenance. Instead, it is a tool that allows representative payees to conserve social security benefits for their intended beneficiary. The SSA explained the interaction of § 407(a) and the representative payee provisions in a response to comments when amending its regulations in 1982. According to SSA: "Whenever there is a use of legal process to compel payment of a past indebtedness which jeopardizes the beneficiary's current maintenance, including the satisfaction of his or her reasonably foreseeable future needs, *it is the representative payee's responsibility to invoke, on the beneficiary's behalf, the protection of section [407(a)]*". 47 Fed. Reg. 20468-01, at 30471-71. In other words, § 407(a) allows the representative payee to ensure that benefits are used for current maintenance – just as the Department is doing here.

3. It is not surprising that the holding below – that § 407(a) prohibits a representative payee from using social security benefits for current maintenance – finds no support in the statutory text

or regulatory scheme. That holding leads to results so illogical and insensible that there is no reason to think that Congress could have intended them.

The illogic of the decision below is apparent when its reasoning is extended to parents who serve as representative payees. The linchpin of the Washington Supreme Court's analysis is that because Washington will pay for a foster child's care itself if social security benefits are not available, it should not be permitted to deprive children of an extra benefit by using social security benefits to reimburse those costs. But this same principle would apply to *parents* who also have a legal obligation to support their children, even if there are no OASDI or SSI benefits. *See, e.g.*, Wash. Rev. Code §§ 26.20.030-.035. Thus, to paraphrase *Keffeler*: "[I]f [a parent] is appointed representative payee for a . . . child [the parent] will confiscate the child's SSI money to benefit the [parent]. However, if *anyone else* is appointed, the [parent] will bear the cost of . . . care". Pet. App. 18. Therefore, under the reasoning below, a representative payee parent may not use the benefits to pay for current maintenance.

It seems unlikely that Congress could have intended this result. For one thing, it is in tension with other provisions designed to put social security benefits in the hands of parents and family members, presumably on the theory that they can be trusted to make financial decisions in the best interest of the beneficiary. *See* 42 U.S.C. §§ 405(j)(2)(C)(iii)(I), PA at 161; 1383(a)(2)(v)(I), Pet. App. 181 (permitting relatives, who are creditors, to be appointed representative payee, if they live with the beneficiary). *See also* 20 C.F.R. §§ 404.2021(b)(1), Pet. App. 209; 416.621(b)(1), Pet. App. 234-35

(giving first preference to be appointed representative payee is a "natural or adoptive parent who has custody of the beneficiary").

It would also run contrary to the consistent lower court case law holding that parents may use social security benefits to pay for current care of children, despite the fact that the parents have the legal obligation to support their children. *See Mellies v. Mellies*, 815 P.2d 114 (Kan. 1991) (rejecting claim that a father must conserve social security benefits for the future benefit of the son rather than spending them on current maintenance); *In re the Guardianship of Nelson*, 547 N.W.2d 105 (Minn. Ct. App. 1996) (same).

Finally, any such rule might impose onerous and seemingly absurd accounting requirements on parents – requiring, for example, that they use social security benefits directly to purchase a computer for their child, rather than "reimbursing" themselves as "creditors" – when they pay their monthly credit card bills.

This may not be the result the court below intended. But the only other alternative is equally illogical and equally unsound. If, in fact, the holding below does *not* extend to parents, then the upshot is the Department, acting in a custodial capacity with respect to children in its care, may not use social security benefits to pay for current maintenance, while a parent, acting in the same capacity, may. There is no self-evident rationale for this unequal treatment – and none offered by the court below – and no reason to believe it was intended by Congress.

C. The Decision Below Should Be Reversed Because It Is Inconsistent With The Commissioner's Interpretation Of SSA Regulations, Which Are Entitled To Considerable Weight

Though the holding below rests exclusively on § 407(a), the court also suggests that the Department's use of social security benefits may be inconsistent with governing regulations, specifically the regulation requiring that benefits be used in the best interest of the beneficiary. Pet. App. 28. As shown in part A of this brief, the Department's practice is in fact expressly approved by the relevant regulations. But even if the regulations were ambiguous on this point, the Commissioner's determination that the Department's use of benefits is consistent with regulatory requirements would control.

As this Court reaffirmed just last term, an agency's interpretation of its own regulations is entitled to considerable legal leeway. *Barnhart v. Walton*, 122 S. Ct. 1265 (2002). Unless an agency interpretation is "plainly erroneous" (*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) or "plainly inconsistent with the wording of the regulation" (*United States v. Larionoff*, 431 U.S. 864, 872-73 (1977)) it should be accepted as correct. The court below did not purport to find the SSA's interpretation of its own regulations wanting under this very deferential standard.[15] Instead, it failed to

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[15] The court below did not question the validity of the regulations themselves and nor have respondents. The only issue in this case is the proper interpretation of those regulations. Most specifically, the Commissioner has stated

apply the standard altogether, simply substituting its judgment for that of the agency charged with administration of the relevant programs.

The Commissioner's position on this point dates back to 1961. In that year, the Commissioner adopted 20 C.F.R. § 404.1604, which provided that payments "certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance". 26 Fed. Reg. 11828. Since that time, the Commissioner has consistently taken the position that payments made for current maintenance are permissible under its regulations, even when – contrary to the views of the court below – that maintenance would otherwise be provided by the state at no charge to the beneficiary.

In Social Security Ruling 66-20, for example, issued in 1966, a relative was appointed representative payee for a beneficiary confined to a hospital for criminal insanity. The hospital requested that the payee pay $50 a month for the

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expressly, in this case, that the Department in its capacity as representative payee may use social security benefits to pay for current care consistent with regulatory requirements – including the requirement that benefits be used "in the best interest" of the beneficiary. *See* Brief For The Amicus Curiae Kenneth Apfel, Commissioner Of The United States Social Security Administration, *Guardianship Estate of Danny Keffeler v. State of Washignton*, 145 Wash.2d 1, 32 P.3d 267 (2001) (No. 67680-1) (rejecting argument that Department practice fails to meet regulatory "best interest" requirement); Brief For The United States As Amicus Curiae, State of Washington v. Guardianship Estate of Danny Keffeler, U.S. Supreme Court, No. 01A557, filed February 2002.

care of the beneficiary. Under the reasoning below, it would not be in the beneficiary's best interest to pay for care that the hospital would otherwise provide without charge. But the Commissioner concluded that "it would be proper under the regulation for the representative payee of the beneficiary to use part of the benefits to meet the customary charges made by the institution". SSR 66-20, 1960-1974 Soc. Sec. Rep. Ser. 385, at *1 (1966 WL 3055 (S.S.A.)).

The Commissioner confirmed this view two years later in Social Security Ruling 68-18. This ruling involved a beneficiary in a nursing home, whose cost of care was being met by the county welfare department. The county asked the beneficiary's private representative payee to use some of her benefits to pay for her cost of care. Again, under the decision below, it would be improper to use the benefits to pay for this care already provided by the county. The Commissioner concluded to the contrary: "Although the Welfare Department is currently paying for the beneficiary's care, such Department is not in fact responsible for providing that portion which could be provided by her own income because to that extent the individual is not needy. Under such circumstances, the current maintenance needs of the beneficiary herein may not be considered to be provided for by funds other than her social security benefits." SSR 68-18, 1960-1974 Soc. Sec. Rep. Ser. 516, at *2 (1968 WL 3918 (S.S.A.)).

In sum, the SSA's longstanding and consistent position is that the Department acts within regulatory requirements when, as representative payee, it applies social security benefits to cover the

costs of current maintenance. The Washington Supreme Court erred by failing to give this position the deference to which it is entitled.

D. The Department, Acting As Representative Payee, Does Not Act As A Creditor When It Uses Benefits To Pay For A Foster Child's Care

1. The Washington Supreme Court began its analysis with the mistaken view that the crucial question in the case was whether the Department acts as a creditor. That is not the "crucial question" in this case. The term "creditor" appears nowhere in § 407(a). Based on this mistake, the court held that § 407(a), barred the Department from this use of the benefits "because despite DSHS's status as representative payee it performs the role of creditor when it takes the foster child's SSA entitlement to reimburse itself for moneys spent on the child". Pet. App. 25. The linchpin of the Washington Supreme Court's analysis is that Washington will pay for a foster child's care itself if social security benefits are not available. In the view of the court, a "child is better off with any payee other than the state because DSHS must provide foster care under state law *regardless* of whether it receives a reimbursement". Pet. App. 19 (emphasis in original). Thus, the court announced a broad rule that section § 407(a) prohibits a representative payee, who is responsible for paying for a beneficiary's current care, from using social security benefits for that purpose.

2. The court's analysis is fundamentally flawed. The conclusion that a child is better off with any payee other then the state is based on the mistaken notion that if the state is paying for a beneficiary's current care it is not in the beneficiary's interest to use social security benefits to pay for that care. The Commissioner rejected this interpretation in Social Security Rulings 66-20 and 68-18. In both cases the Commission concluded that it was proper for the representative payee to use social security benefits to pay for the beneficiary's care – even though the government was already paying for that care. *See supra* p. 32-33.

It is true that § 407(a) prevents the Department from bringing suit to compel a private representative payee to pay for a beneficiary's current care. But if a private payee refuses to use the benefits to pay for current care, the Commissioner has an obligation to remove that payee and choose an alternate payee, who will make proper use of the benefits. This action by the Commissioner is seldom necessary since private payees do pay social security benefits to the state to help offset the cost of care. JA 127, ¶ 14.

The Washington Supreme Courts analysis on this point also ignores the reality of trying to protect abused and neglected children. The Court's reasoning appears to assume that there are numerous private individual's and organizations waiting to act as representative payee for foster the children. The reality is otherwise. As the Children's Defense Fund, Catholic Charities, USA, the Child

Welfare League of America and the Alliance for Children and Families explained in their amicus brief supporting the Department's petition, many children have no relative, guardian, or close friend to act as representative payee. States and other governments who undertake this responsibility perform a vital function. Without this effort many children with disabilities would never be determined eligible for – or actually receive benefits. Brief of Children's Defense Fund, et al., As Amici Curiae In Support Of Petitioners, *State of Washington v. Guardianship Estate of Danny Keffeler*, Supreme Court, No. 01-1420, filed April 2002, at 15. State or local governments in every state undertake the representative payee function for foster children and use the benefits to help pay for the children's cost of care. Brief Of The States Of Florida, et al., As Amici Curiae In Support Of Petitioners, *State of Washington v. Guardianship Estate of Danny Keffeler*, Supreme Court, No. 01-1420, filed April 2002, at 1. Indeed, social service agencies are last on the Commissioner's list of preference for appointment as representative payee. Thus, when a state agency is appointed it is usually because there is no one else willing or able to undertake the responsibilities of payee.

3. The Washington Supreme Court's conclusion that the Department is a creditor is also in error. The court below not only asked the wrong question, it reached the wrong answer. The Department is not a creditor in any sense meaningful here. When a parent provides care for a

child, it does not create a creditor/debtor relationship with the child by reason of that care. The same is true of the Department. It provides foster care even if a child receives no social security benefits. Moreover, social security benefits seldom cover the actual cost of foster care.[16] Yet the Department does not send a bill to the child for the additional amount of unreimbursed foster care – as would be appropriate in an actual creditor/debtor relationship.

4. The court below based its conclusion that the Department is a creditor on the Department's use of the term "reimbursement". ("Furthermore, the bare logic of reimbursement also implies a creditor-debtor relationship." Pet. App. 26.) But the Department only reimburses itself in an accounting sense in that it first pays for care and then uses the OASDI and SSI benefits later. Pet. App. 61, ¶ 54. For example, in February the Department pays providers for the child's January foster care expenses. After the Department pays the providers it determines how much of the social security benefits will be used to reimburse the Department for the care provided. Pet. App. 56, ¶ 28. For example, in March, after the accounting is performed, the Department applies the January benefit for the care provided in January. However, the result would be exactly the same if the Department sent the January benefit to the foster parent in January, along with a second check to make up the difference between the social security

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[16] For example, between 1997-1999 the Department paid $30,097 for the care of Nacole B. and applied only $7,912 in social security benefits to pay for her care. *Supra* n.7, p. 13.

benefit and the actual cost of foster care. In this situation, the child receives the social security benefits and the Department would pay out fewer state dollars – but there would be no reimbursement.[17]

5. There is one important practical difference between prepayment and reimbursement. An accounting system based on reimbursement helps ensure that social security benefits are properly used. For example, if the Department prepays January care and then the foster child moves to a group home halfway through the month, there will be an overpayment to the foster parents. In that case, the foster parents would not be entitled to keep the full social security benefits, and the Department would have to obtain a refund from the foster parents so the benefits could be provided to the new caregiver. A reimbursement system more effectively ensures that the Department pays only for care that has actually been provided. This is particularly important when dealing with social security benefits because of the Commissioner's strict accounting standards.

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[17] The majority also cites Wash. Rev. Code § 74.13.060 to support its notion that reimbursement establishes a creditor-debtor relationship. Pet. App. 26. In fact, the statute provides for reimbursing public assistance "expended on behalf of said *person during the period for which the benefits*, payments, funds or *accruals were paid*". Wash. Rev. Code § 74.13.060(2), Pet. App. 26 n.15, 253 (emphasis added). Thus, January benefits go to pay the January cost of care which, as described above, is exactly how the Department operates.

CONCLUSION

For the foregoing reasons the judgement of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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